IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA
NOS. 21-0845, 21-0893, 21-0885

WEST VIRGINIA LAND RESOURCES, INC.,
MARION COUNTY COAL RESOURCES, INC.,

Petitioners,

vs. **No. 21-0845**

AMERICAN BITUMINOUS POWER PARTNERS, L.P.,
a Delaware limited partnership, and
WEST VIRGINIA ENVIRONMENTAL QUALITY BOARD,

Respondents.

BRIEF OF RESPONDENT

Appeal from the Environmental Quality Board
20-07EQB
Appeal No. 21-0845

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Response to Assignment of Error Number 1: While American Bituminous Power Partners, LP (AMBIT) disputes that Petitioner herein had standing to proceed below (and without waiving same), the Environmental Quality Board acted within its legitimate powers in reducing the permit values to the 2014 level, in that the Board found that the permitted increase in volumes (not the original underlying permitting) was arbitrary and capricious. It acted within its legitimate powers in declining to act further.

Response to Assignment of Error Number 2: While AMBIT disputes that Petitioner herein had standing to proceed below, the Environmental Quality Board assembled a full factual record before determining how best to proceed.

Response to Assignment of Error Number 3: While AMBIT disputes that Petitioner herein had standing to proceed below, Petitioner impermissibly and without basis estimates the Board's reasoning and finds it lacking. Conversely, the Board acted within its legitimate powers and, if Murray had standing to proceed, the Final Order must stand.

IV. RESPONSE TO STATEMENT OF THE CASE

A. Introduction

The West Virginia Department of Environmental Protection (WVDEP) oversees the Underground Injection Control (UIC) program, including applications for and issuance of UIC permits. *See* 47 CSR 9, 47 CSR 13, 47 CSR 55. On March 5, 2020, American Bituminous Power Partners, LP (AMBIT) completed more than a year's work with WVDEP on its application for the third reissuance (JA000038) of the 1984 underground injection control (UIC) permit number 394-01-049, which permit governs the injection of fluids with properties consistent with acid mine drainage (AMD) into an approved abandoned mine void that is part of the Fairmont Mine Pool system, "a flooded complex of closed underground mines near Fairmont, West Virginia." (JA000574)

UIC permit number 394-01-049 had been issued originally in 1984 to Eastern Associated Coal (JA000169), and AMBIT had inherited the permit and the responsibility for the permit, the

property and the AMD at issue through a lease it entered with Horizon Ventures of West Virginia, Inc. (Horizon) (owner of the parcel and thereby the injectate). JA000193. After AMBIT's considerable data collection and application submission process, and after WVDEP's extensive and thorough review and revisions,[1] the proposed third reissuance of permit 394-01-049 went out for public comment on or about April 23, 2020. No comments were received, and the reissuance was granted on May 29, 2020 (JA000039), with one modification not at issue here on June 12, 2020. JA000035.

As set out in its Final Order (and as demonstrated by the record below), EQB recognized the renewal process as what it was – a renewal of a previously approved permit that had been in place since 1984, seeking modification as to injection flow. JA001045, JA000089. EQB treated its review of this, an application for third renewal of an established permit within an established program, as seeking an increase in the injection limits from 52,150 gallons per day (gpd) up to an average of 266,400 gpd. JA001045. The record demonstrates that AMBIT was not seeking an increase. The record demonstrates that between the second and third renewal, the regulation had changed from 'as reported' (meaning that whatever is reported is acceptable) to a precise limit, such that AMBIT needed to specify an injection amount. Evidentiary Hearing Tr. at 644-54.

In presiding over the appeal process, the Board determined that the injection amount was the factor upon which WVDEP's oversight was arbitrary and capricious. Indeed, no evidence was adduced at hearing that would challenge that finding, such that West Virginia Land Resources, Inc.'s and Marion County Coal Resources, Inc.'s (hereinafter "Murray's") appeal to the extent it exceeds that one change in the application necessarily resonated below and here as a challenge to the Underground Injection Control process generally. After all, AMBIT was participating in the

[1] JA000680, JA000698.

UIC program as permitted. The issue as framed by EQB was narrow – whether WVDEP adequately investigated and considered the requested increase in injectate limits. And EQB determined that WVDEP's review of that precise issue was improper in that WVDEP had failed to 'properly assess[] the impact on active mine operations, the Fairmont Mine Pool, the waters of the state, etc., [such that] DEP's approval of the application was therefore arbitrary, capricious, and in violation of applicable statutory and legal provisions." JA001062.

Permit revocation was unnecessary and improper in the instance of an unsupported increase in injectate. Per EQB's framing of the issue, it eliminated the improper portion of the renewal process (the alleged 'fivefold increase' in permitted injection) but left the remainder of the permit in place, no doubt in recognition of the fact that AMBIT was functioning within the UIC program as envisioned, and Murray's complaints to the contrary were reflective of the larger Mine Pool system, not anything improper that AMBIT was doing (as its actions were compliant with its existing permit). The Board considered the necessary factors, including weighing the impact on both parties, on the waters of the State and on the UIC program generally. The Board exercised its discretion and ruled within the facts and law of the case.

Whereas Murray would inflame this tribunal (as it tried to do with EQB) with allegations of a proposed fivefold increase in permitted injection limits, with repeated references to acid mine drainage (AMD) and to alleged renegade behaviors by AMBIT and WVDEP, it is the bailiwick of the EQB to address such issues, to take and consider the evidence in a non-partisan fashion, to take on the federal mandate of oversight within West Virginia, and EQB does just that.[2] Where AMBIT has believed and believes now that Murray lacks an injury-in-fact so as to anchor standing and

[2] *See, e.g.,* West Virginia Code Section 22B-1-5(4) "To perform any and all acts within the appropriate jurisdiction of each board to secure for the benefit of the state participation in the appropriate federally delegated program."

believes that EQB's legal conclusion on that point was error. *See* Brief of Petitioner – 21-0885, 21-0893, nonetheless, assuming *arguendo* that Murray had standing to proceed, the outcome below falls well within the Board's authority and discretion.

AMBIT denies that its permit renewal was granted without proper assessment and review, and AMBIT avers that Murray never demonstrated injury-in-fact so as to gain standing.[3] However, beyond those objections, AMBIT attests that the EQB process operated to inquire into the narrow issue before it, took three full days of testimony on that narrow issue, reviewed the submissions of the parties, and issued an order clearly within its discretion and authority. JA001046. Therefore, while AMBIT maintains its position that the process should never have proceeded and that, regardless, Murray's true issue is the UIC program generally and the management of the Fairmont Mine Pool (responsibility for which Murray voluntarily accepted), it is also inescapably true that, to the extent EQB's process and rulings stay within the law and the Board's discretion, it is not incumbent on litigants to challenge the Board's discretionary rulings, as here.

For these reasons and those set out further below, Murray's appeal must fail.

B. Response to Petitioner's Operations

In the EQB administrative appeal and relative to its operations, Murray alleged in pertinent part that AMBIT's permitting process was flawed and improper in that "[i]t will cost MAEI hundreds of thousands of dollars to handle and treat the Injectate that is *authorized to be injected by ABPP under the UIC Permit* and treated at the Dogwood Lakes AMD Treatment Plant. Because ABPP *has not entered into any agreement* with MAEI to allow for the handling and treatment of the Injectate, the application for the UIC Permit was incomplete and the UIC Permit should not

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[3] *SER WVUH v. Hammer,* No. 21-0095)___ W. Va. ___, ___ S.E.2dd ___ at 11 (Nov. 19, 2021) at 15, quoting *State ex rel. Healthport Techs., LLC v. Stucky*, 239 W. Va. 239, 243, 800 S.E.2d 506, 510 (2017). *See also* Syl. pt. 6, *Corliss v. Jefferson City Board of Zoning Appeals*, 214 W. Va. 535, 591 S.E.2d 93 (2003), expressly identifying 'aggrieved' as mandating standing.

have been issued." JA000028 (emphasis added). Whereas Murray reports in its Brief that it 'acquired and now operates' a variety of active and mined-out mines, Murray stops short of admitting that it voluntarily accepted responsibility for the Dogwood Lakes Acid Mine Drainage Treatment Plant and management of the Fairmont Mine Pool as part of its purchase of CONSOL's assets in West Virginia in 2013. Evidentiary Hearing Tr. at 68, 86, 118. While this may have proven to be an unfortunate business decision for Murray,[4] that does not translate into standing to appear before the EQB nor does it affect the Board's consideration of the permitting process. Petitioners' Brief on Behalf of West Virginia Land Resources, Inc. and Marion County Coal Resources, Inc. (hereinafter 'Petitioner's Brief') references the costs Murray incurs as part of the responsibility it voluntarily accepted to treat AMD at one of two treatment plants it operates as part of the management of the Fairmont Mine Pool system, yet none of that is relevant to whether WVDEP's consideration of the renewal application was arbitrary or capricious. *See* Petitioner's Brief at 4-6.

Once again, the UIC permit and the Mine Pool system have been in place at least since 1984. What was *new* in the renewal process was the increase in permitted injectate flow limits. It was that increase that EQB considered, and given that narrow scope of review, the remedy was narrow as well. To the extent that Murray wants to change the Mine Pool system or offload or share the burden it voluntarily undertook, that is a process beyond EQB and this Court. Murray needs and seeks legislative or regulatory assistance with this burden that cannot now be and has not been available through an administrative challenge of a long-time, lawful permittee.

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[4] In the EQB administrative appeal, Murray alleged in pertinent part that the permitting process was flawed and improper in that "[i]t will cost MAEI hundreds of thousands of dollars to handle and treat the Injectate that is *authorized to be injected by ABPP under the UIC Permit* and treated at the Dogwood Lakes AMD Treatment Plant. Because ABPP *has not entered into any agreement* with MAEI to allow for the handling and treatment of the Injectate, the application for the UIC Permit was incomplete and the UIC Permit should not have been issued." JA000028 (emphasis added).

Whereas Murray provided testimony relative to amounts and costs of treatment at the AMD plants is operates, it has no evidence whatsoever of the source of the injectate that arrives there and admits that it has done nothing to trace AMBIT's Injectate.[5] Indeed, Murray finally could not attest that AMBIT's Injectate goes anywhere outside its permitted mine void, and the experts at evidentiary hearing were equally flummoxed – all as reflected in the Final Order.[6]

AMBIT asserts that Murray has had no standing to pursue this appeal and that the relief it seeks must be unavailable here as well. Beyond that, however, the relief that was available – the fate of the increased volumes in the renewal – was handled appropriate by EQB, according to its mandate and well within the law and its discretion. Therefore, Murray's appeal must fail.

C. Response to AMBIT's Operations.

At all times at issue, AMBIT performed as authorized by its permit; both by the express terms of Murray's administrative appeal and per WVDEP's UIC program. West Virginia Code Section 22-11-8(b)(7) provides that it is unlawful to operate a disposal well, unless permitted to do so:

> (b) It is unlawful for any person, **unless the person holds a permit therefor from the department**, which is in full force and effect, to:
>
> * * *
>
> **(7)** Operate any disposal well for the injection or reinjection underground of any industrial wastes, including, but not limited to, liquids.

Indeed, West Virginia law allows AMBIT to perform just as it has pursuant to the terms of its UIC permit. Murray argues to AMBIT's presumed contribution to the Mine Pool, to what AMBIT would do without the Mine Pool, yet Murray fails to concede that dozens of mines empty into the treatment plants Murray operates[7] – AMBIT's inclusion or exclusion does not change Murray's

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[5] As the EQB found finally, "the flow path of the Injectate has not been established by reasonable degree of hydrogeological certainty. No current or updated reliable flow path has been established." JA001046.
[6] JA001061, conceding that "no reliable flow path of the untreated AMD Injectate has been established."
[7] JA00859ff.

voluntarily accepted burden. And the remedy for that burden is not randomly challenging AMBIT's renewal permit and now continuing the process further in pursuit of revocation AMBIT's UIC permit generally.[8]

No evidence exists that, with AMBIT's performing as permitted, the Joanna Injectate even reaches Murray's treatment facilities, and Murray and its expert admitted that they have done no testing or investigation of any sort to determine whether the Injectate leaves the Joanna Mine void at all. Evidentiary Hearing Tr. at 103, 181, 187. Nonsensically, however, even given that Murray cannot and has not proven that the injectate travels at all, nonetheless Murray argues that "Petitioners ultimately bear the cost to manage and treat AMBIT's AMD regardless of whether the water flows east and north to the Dogwood Lakes AMD Plant. . . or west and south to the Lewellyn and Thorne AMD facility[,]"[9] AMBIT participates in the Mine Pool system as it is permitted to do. No provision has ever been in place for any permittee to pay a fee for injection, and the burden that Murray now alleges is one it voluntarily accepted. It is evident in Petitioner's Brief that Murray regrets the responsibility it voluntarily undertook, just as it is equally evident that the relief it seeks from that responsibility is unavailable here.

Murray continues to focus on its responsibility to the exclusion of the realities of the process it initiated. Murray fails to recognize that EQB focused only the changed terms on renewal, finding finally that DEP's approval of those changed terms was unsupported by WVDEP's review process. In Petitioner's Brief, Murray continues to rail against the Mine Pool system and what it perceives to

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[8] *See* Tr. at 127:

15 . . .You know, I feel like we undergo a much
16 higher degree of scrutiny on some of the permits that
17 we've turned in, at least, you know, by information that
18 I've received from other people in Murray, not my direct
19 experience. And those standards should be, you know,
20 applied equally to everybody.

[9] Petitioner's Brief at 8. Of note, as this Court is aware, EQB awards no financial damages.

be the unfairness of the bargain it undertook voluntarily. That has nothing to do with AMBIT's operations and its AMBIT's own issues and responsibilities, including the Joanna parcel. Murray notes that AMBIT has undertaken its own responsibilities relative to the Joanna, and AMBIT at evidentiary hearing spoke at length about the financial responsibilities inherent in business, beyond any estimation of 'fair' or 'unfair.'[10]

The issue here is WVDEP's analysis of the permit renewal process – in particular, the increase in injectate flow rate. EQB found that WVDEP's review of that changed flow limit was arbitrary and capricious, such that the requested changed flow limit was struck. The Board expressly noted Murray's interest in vacating AMBIT's permit and yet declined to find that remedy appropriate. The process before the Board was WVDEP's application review process – not AMBIT's UIC permit generally. The remedy the Board crafted fits the issue before the Board, even as the Board seems to join AMBIT and WVDEP in wondering at Murray's interest in pursuing one lawful permittee in a field of dozens. Murray's administrative appeal and now Supreme Court appeal is moot and improper, as follows.

D. Response to Deficiencies in Application and Process.

Petitioner's Brief recounts twelve perceived errors in the UIC permitting process without recounting the apposite evidence adduced by WVDEP and AMBIT. Murray cites to current maximum rates of injection,[11] up-dip/downdip evidence,[12] flowpath,[13] adequacy of alternative

[10] *See, e.g.,* Tr. at 662-63.
[11] Final Order at 18.
[12] Final Order at 12; Tr. at 632-33.
[13] Final Order at 18.

plan,[14] legal right to inject,[15] compliance issues,[16] hydrologic balance,[17] stormwater provisions,[18] legal advertisement[19] and MSHA approval.[20] Several of these were referenced in the Final Order, and all of them were subject to conflicting testimony at Evidentiary Hearing. Most pointedly to the instant appeal, EQB specifically recognized Murray's interest in revocation,[21] finding that the burden Murray brought to the Board (of note, a voluntarily accepted burden that has nothing to do with AMBIT and its permit) could be addressed by a reduction in injectate flow limit. Regardless of the fact that Murray disagrees with the remedy provided at evidentiary hearing, the Board heard Murray's evidence, heard all of the evidence, and found as a matter of law and fact that the remedy that addressed any regulatory review failure was a return to the permitted values of the 2014 levels. The Board addressed the precise issue now before this Court and issued a decision well within its authority and the law. For that reason, Murray's appeal must fail.

E. Response to Procedural history.

In response to Murray's 'Procedural history,' AMBIT asserts that the underlying process and procedure are reflected in the documents before this Court. Beyond that, however, even Murray's recitation of the Final Order undercuts Murray's arguments here. That is, Murray itself recognizes that EQB found the renewal application inaccurate and incomplete (both of which AMBIT denies), such that "DEP's approval of the application was therefore arbitrary, capricious and in violation of applicable statutory and legal provisions." Petitioner's Brief at 12. Murray concedes that the Board

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[14] Final Order at 18.
[15] Tr. at 251 (finding the term outside the UIC process). *But see*JA000193, wherein the property owner contracted by lease to AMBIT the right "to perform any other actions incidental to the reclamation" of the Joanna Parcel.
[16] Final Order at 11-12.
[17] Final Order at 11-12.
[18] Tr. at 331, 667 (addressing this as enforcement issue).
[19] Tr. at 403-04.
[20] Tr. at 585. *See generally* Petitioner's Brief at 9-11.
[21] Final Order at 18.

recognized 'all these errors and deficiencies' and objects that Board failed to recognize other errors and deficiencies that, of note and admittedly,[22] Murray raised largely at evidentiary hearing rather than in its original administrative appeal to the EQB.[23] Once again, as recognized in its recitation of deficiencies, Murray cites to current maximum rates of injection,[24] up-dip/downdip evidence,[25] flowpath,[26] adequacy of alternative plan,[27] legal right to inject,[28] compliance issues,[29] hydrologic balance,[30] stormwater provisions,[31] legal advertisement[32] and MSHA approval.[33] Several of these were referenced in the Final Order, and all of them were subject to conflicting testimony at Evidentiary Hearing.

Most pointedly, however, Murray fails to recognize the significance of the Board's finding that the renewal process was "in violation of applicable statutory and legal provisions" and fails to acknowledge that the Board expressly acknowledged and understood Murray's goal before the Board when the Board recounted in the Final Order that Murray "requested the Board to vacate the AMBIT UIC Permit."[34] Unlike the Board, Murray fails to acknowledge even now that the process before WVDEP and, therefore, before the Board was a third renewal of an UIC permit that had been lawfully in place since 1984. In a nutshell, the challenge Murray raised was to a renewal application filed by an established permittee, who has been participating in the UIC program and the Fairmont

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[22] Petitioner's Brief at 13, admitting that the alleged deficiencies arose "based on the evidence presented during the evidentiary hearing."
[23] *See* JA000028-30 versus JA000896, JA000898, JA000899, JA000919, JA000925.
[24] Final Order at 18.
[25] Final Order at 12; Tr. at 632-33.
[26] Final Order at 18.
[27] Final Order at 18.
[28] Tr. at 251 (finding the term outside the UIC process).
[29] Final Order at 11-12.
[30] Final Order at 11-12.
[31] Tr. at 331, 667 (addressing this as enforcement issue).
[32] Tr. at 403-04.
[33] Tr. at 585. *See generally* Petitioner's Brief at 9-11.
[34] JA001061.

Mine Pool as envisioned and allowed by West Virginia law. The Board found that the renewal process was deficient – not that the underlying permit was illegal, ill-founded, outside the UIC process or even West Virginia law. Indeed, it will not have escaped the Court's attention that the Board's Final Order even addressed what all present knew -- Murray's true issue -- when it found that "[a] reduction in the volume of water injected into the Fairmont Mine Pool would reduce the volume of water that Appellants have to pump and treat from the Fairmont Mine Pool at their expense."[35] No moneys are inherent in Murray's voluntarily accepted responsibility for the treatment of Mine Pool waters, and no moneys are available to Murray from its EQB appeal. Nonetheless, it was apparent to all involved in the process that what Murray seeks is relief from the burden it voluntarily accepted when it purchased CONSOL's assets and liabilities – indeed, Murray acknowledged the same at evidentiary hearing[36] and its initial filing in the underlying process.

> It will cost MAEI hundreds of thousands of dollars to handle and treat the Injectate that is authorized to be injected by ABPP under the UIC Permit and treated at the Dogwood Lakes AMD Treatment Plant. Because ABPP has not entered into any agreement with MAEI to allow for the handling and treatment of this Injectate, the application for the UIC Permit was incomplete and the UIC Permit should not have been issued.[37]

Beyond that, Murray's corporate representative admitted peevishly under oath that the company feels that it is subject to closer scrutiny in the regulatory process than is AMBIT,[38] thereby selecting AMBIT's renewal permit for scrutiny when, in point of fact, the vast majority of UIC permittees do not pay for treatment of injectate, which payments are not part of or to date envisioned in the Mine Pool management process.[39] Indeed, in terms of any injury-in-fact, it bears reiterating that, even now, Murray cannot and has not traced AMBIT's Injectate and cannot attest that it even leaves the

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[35] JA001061.
[36] Evidentiary Hearing Tr. at 68, 86, 115
[37] JA000028.
[38] Evidentiary Hearing Tr. at 127.
[39] Evidentiary Hearing Tr. at 68

entry mine void. Murray also has admitted it was unaware of AMBIT's permit, unaware of its injectate, unplagued by AMBIT's UIC participation – until it came across the renewal permit listed on the WVDEP website, which somehow struck a nerve that brings us here today.[40]

Nonetheless, the Board recognized and understood the alleged deficiencies argued by Murray and litigated through Evidentiary Hearing. The Board recognized and understood the remedy Murray sought. And, finally, the Board selected a remedy it believed was appropriate and sufficient to address the issues litigated before it. No error of law or misconstruction of fact has led to this outcome. EQB heard and understood the evidence adduced before it and selected the penalty is saw fit – all within West Virginia law and the Board's discretion. Murray was seeking a harsher penalty that finally would not change its voluntarily accepted duty in any meaningful way[41] but that would change AMBIT's operations substantially.[42] EQB considered all of these factors and acted lawfully in response.

Additionally, the respondent below is WVDEP, not AMBIT, and it was WVDEP's process that was under review. WVDEP has the legal mandate to ensure that applicants provide the requisite information and comply with the letter and spirit of the regulatory law and process. While the evidence adduced at Evidentiary Hearing was that the permit renewal application process took eighteen months and involved multiple revisions, all with the knowledge and input of Murray's environmental compliance personnel pre-approval and directly, nonetheless, the process was found deficient. EQB was not asked to adjudicate the UIC program generally nor AMBIT's legacy permit. EQB reviewed this renewal process, found that it was deficient, and acted accordingly, all within its legitimate powers and discretion. Murray's Procedural history recounts but fails to acknowledge

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[40] JA000028.
[41] Evidentiary Hearing Tr. at 609.
[42] JA001061. *See also* Evidentiary Hearing Tr. at 695.

same.

Beyond those failures, AMBIT objects to Murray's efforts to characterize AMBIT's related appeal to this Court, said appeal sounding largely in standing. AMBIT objects to the characterization in particular, given that AMBIT's appeal process speaks for itself and is not improved by the truncated recitation Murray provided it.[43]

Murray's administrative appeal raised as its primary concern – indeed, listed first and expressly numbered one – that "[i]t will cost MAEI hundreds of thousands of dollars to handle and treat the Injectatethat is authorized to be injected by [AMBIT] under the UIC Permit and treated at the Dogwood Lakes AMD Treatment Plan[, and AMBIT] has not entered into any agreement with MAEI to allow for the handling and treatment of this Injectate[.]"[44] In Petitioner's Brief, Murray likewise admits that "[u]nbeknownst to the Petitioners,"[45] AMBIT has been operating under its UIC permit exactly as it was permitted to do. The fact that Murray may have never known of AMBIT's existence as a permittee, was unaware of the Joanna Parcel, and, even now, at the end of this protracted and expensive process it initiated, is unable to identify the flowpath of any injectate (or even to determine whether it leaves the receiving mine void)[46] lends credence to the assertion that Murray has no injury-in-fact and that this

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[43] *See Brief of Petitioner* (21-0885, 21-0893), presenting in pertinent part that this Court has held that "[s]tanding is comprised of three elements:

> First, the party attempting to establish standing must have suffered an "injury-in-fact"—an invasion of a legally protected interest which is (a) concrete and particularized and (b) actual or imminent and 15 not conjectural or hypothetical. Second, there must be a causal connection between the injury and the conduct forming the basis of the lawsuit. Third, it must be likely that the injury will be redressed through a favorable decision of the court.

Syl. pt. 5, *Findley v. State Farm Mut. Auto. Ins. Co.*, 213 W. Va. 80, 576 S.E.2d 807 (2002).

[44] JA000028.

[45] Petitioners' Brief at 13. *See also* JA000074 identifying the flow parameter as 'as reported,' meaning whatever is reported, without limitation; JA000667-68, identifying French drain that ensures minimal surface water incursion, if any; JA000103 Murray admitting they have done no testing of the Joanna process/waters to support their allegations.

[46] JA001046.

process is about more than whether WVDEP is vigilant in its regulatory duty. Murray alleged that because it was not part of the approval process (including granting its permission to inject and imposing fees),[47] the application process was incomplete, ***yet neither of these factors is part of the regulatory process as it exists.***

Further, as AMBIT has argued, Murray alleges that the application for the UIC Permit was incomplete and that the UIC Permit *renewal* should not have been issued because the application *in its estimation* (as distinguished from the regulatory agency's estimation) failed to address adequately numerous other requirements.[48] WVDEP, the agency charged with approval and oversight, was satisfied with the renewal application as revised and approved same. WVDEP was the alleged subject of the EQB process, not AMBIT, and yet Murray has made and now is making this a vendetta against a lawful permittee. Without conceding that it has no evidence of any injury caused by AMBIT, Murray continues to seek not further admonitions against the agency that is the respondent, but rather a scorched-earth remedy against a permittee. Murray has an issue and an agenda here that has not been fully explored or revealed at this time, but EQB focused on

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[47] *See,.e.g,* JA000127.

[48] *See, e.g.,* legal right to inject (which is outside the provisions of the related West Virginia law. Evidentiary Hearing Tr. at 250-51), identification of an alternative process or work-around (which was included but not in sufficient detail for Murray), failure to explain assumptions in the application (to Murray's satisfaction) and failure of the notice process (upon which MAEI admits it never relied). JA000026. *See, e.g., Corliss v. Jefferson City Board of Zoning Appeals*, 214 W. Va. 535, 541, 591 S.E.2d 93, 99 (2003), requiring that plaintiff identify precisely how s/he is aggrieved by any alleged inadequacy. Murray objected to AMBIT's permitted levels for injectate – not that AMBIT exceeded its levels, but that it had been permitted at too high a level. Evidentiary Hearing Tr. at 20. AMBIT sought and received a renewal of its second permit, which had been issued under a 'report-only' standard:

12 Q Is it true that number two had a report
13 only requirement instead of an actual number
14 requirement?
15 A Yes.
16 Q What does report-only mean?
17 A There's not a limit on it, that it's just a
18 reportable amount.

Evidentiary Hearing Tr. at 384. Because there was no limit, no violations were possible *But see* JA001046.

its legitimate authority and ruled within same.

As Murray recounts and characterizes AMBIT's process before this Court, AMBIT renews its own appeal based in standing on the grounds that Murray even now in its own appeal has not and cannot demonstrate standing and injury-in-fact to form the basis of its administrative appeal.[49] In its response to the challenge, Murray has recounted its estimation of the permitting shortcomings and alleged costs set forth in its administrative appeal. JA000413. Murray does not address or concede its failures, including that it cannot prove even a conjectural injury, and does not concede that what it truly seeks is unavailable through this process.

Whereas Murray elected in 2020 to challenge a lawful permittee who had applied for, been properly vetted relative to, and was granted a third reissuance (Evidentiary Hearing Tr. at 69), the evidence adduced at hearing was not of violations and renegade behaviors that injured Murray. The evidence at hearing was that AMBIT acted within the UIC and Mine Pool regulated systems as intended. The record from below demonstrates the truth of the matter that this process has far exceeded any administrative review of agency action and has cartwheeled off into something less appropriate for the EQB or this Honorable Court. Nonetheless, through its own appeal and in opposition to Murray's, AMBIT seeks the relief this Court deems just.

VI. RESPONSE TO SUMMARY OF ARGUMENT

Demonstrating the fact of AMBIT's response herein, Murray's Summary of Argument focuses little on the regulatory oversight provided or not provided in the renewal process by WVDEP

[49] As this Court has recently re-emphasized, "Article VIII, Section 6 of the West Virginia Constitution establishes that there must be a justiciable case or controversy—a legal right claimed by one party and denied by another—in order for the circuit court to have subject matter jurisdiction. In part, this means the party asserting a legal right must have standing to assert that right. State ex rel. Healthport Techs., LLC v. Stucky, 239 W. Va. 239, 242, 800 S.E.2d 506, 509 (2017) (footnote omitted). "This Court has defined standing as [a] party's right to make a legal claim or seek judicial enforcement of a duty or right." Tabata v. Charleston Area Med. Ctr., Inc., 233 W. Va. 512, 516, 759 S.E.2d 459, 463 (2014) (per curiam) (quotations and citation omitted)."

and instead recounts half-truths of AMBIT's UIC permit. Specifically, whereas Murray alleges (and EQB adopted) the finding that AMBIT exceeded its 2014 injection parameters,[50] the record from below is replete with the fact that, in 2014, AMBIT's injection volume was 'report-only.'[51] Per WVDEP's sworn testimony, "[t]here's not a limit on it, that it's just a reportable amount."[52] Also per WVDEP, "If there's not a limit, there shouldn't be a violation on it."[53] Reissuance number 2 was report-only, while reissuance number 3 was going to be a measured rate.[54] This fact is referenced in the application that was submitted, revised, approved prior to the appeal process.[55] Whether Murray was unfamiliar with the concept or term, or elected to lead the Board in a different direction, it is a direct misstatement of the documented facts of this permit.

Murray alleges that AMBIT's and WVDEP's estimation that there was 'no active mining' in the area was incorrect and that WVDEP failed to focus on hydrologic balance in its approval process.[56] However, the Board found that, in its common sense reading of the relevant maps, its understanding of the mine void structures, and the testimony of operations 3 to 12 miles away at their closest,[57] WVDEP and AMBIT had a good faith argument that no active mining was ongoing in the area.[58] The undisputed finding at Evidentiary Hearing was that the permit did minimize the disturbance to the hydrologic balance[59] and that the notice met the legal requirements for public

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[50] Petitioner's Brief at 14; JA001046.
[51] Evidentiary Hearing Tr. at 274.
[52] Evidentiary Hearing Tr. at 384.
[53] Evidentiary Hearing Tr. at 385.
[54] Evidentiary Hearing Tr. at 599.
[55] JA000076, reporting flow limit as 'as reported,' with limit tested once per month, at whatever the level was at measurement. Where the Board found that WVDEP did not verify or enforce the limits (JA001046), the Board failed to focus on the testimony that it was 'as reported,' without a limit, as a logical necessity, there can be no violation. Evidentiary Hearing Tr. at 383.
[56] Petitioners' Brief at 14.
[57] Evidentiary Hearing Tr. at 156.
[58] Evidentiary Hearing Tr. at 220.
[59] Evidentiary Hearing Tr. at 353, citing the regulatory mandates; 353-54, explaining the relevant hydrology for this permit.

notice.[60] Whereas Murray has cited imprecisions in the public notice as published by WVDEP in the appropriate newspaper, finally, Murray also admits that it never saw the public notice, was never injured by any alleged imprecision, and has no evidence of any individual expressing an interest or concern relative to this third renewal yet being sidelined or misled by any vagary of the public notice. It is the quintessential red herring.

Murray relies heavily on what *in its estimation* is sparse or misleading about the application for third renewal of a lawful permit.[61] The instant appeal is based on Murray's estimation that the penalty assessed as against WVDEP (yet felt by AMBIT) was insufficiently severe, that the pound of flesh Murray has sought still evades its grasp. The evidence adduced at hearing was that the renewal application process took eighteen months to complete,[62] involved three sets of revisions and review by multiple divisions of WVDEP,[63] and even included consultation with Murray's own environmental compliance personnel Jon Nagel and Justin Smith months prior to public notice or approval processes,[64] with final notice delivered timely by the applicant to MSHA.[65] Beyond the substantial preparations and review of the application itself, and the examination thereof in minute detail by six witnesses, six lawyers, and the Board over three full days of evidentiary hearing,[66] and despite the fact that Murray can cite what fails to meet its expectations, finally, admittedly, Murray's arguments carried the day before the Board, such that the Board's finding was that DEP's approval of the renewal application was arbitrary and capricious.[67] Nonetheless, even after adopting many of Murray's criticisms of the process, the Board declined to revoke a lawful permit on what the Board

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[60] Evidentiary Hearing Tr. at 588-89.
[61] Petitioners' Brief at 14.
[62] Evidentiary Hearing Tr. at 29, 378-79, 616, 714.
[63] Evidentiary Hearing Tr. at 573-74.
[64] Evidentiary Hearing Tr. at 88ff. *See also* JA000700ff, JA000895.
[65] Evidentiary Hearing Tr. at 255, 585.
[66] Petitioners' Brief at 11.
[67] JA001062.

determined was a hurried or perfunctory review of a renewal application that pointedly included a modification necessary to comply with a change in state law.[68] Once again, the respondent before the EQB was WVDEP, not AMIBT. The process under review was WVDEP's practices in reviewing and approving a renewal application, not the fairness or impact of the underlying permit and not the Fairmont Mine Pool and UIC program generally. In sum, the remedy did not extend beyond what was before the EQB, which did not extend beyond what was before WVDEP – the Reissuance Application.[69]

Murray seeks reversal and remand, and AMBIT seeks a reversal and dismissal of all that came before, given Murray's lack of standing. Finally, regardless, EQB addressed only what was before it, which is what was before WVDEP: a renewal application. It would be an unacceptable, unprecedented and unsupportable leap to exceed the scope of the document under review (a renewal application) and the issue under review (WVDEP's review and approval practices) in order to strip AMBIT of the underlying permit. AMBIT seeks a reversal of outcome below or, at a minimum, asks that the Court uphold the process where it stands, either of which would fall within the scope of the matter upon administrative appeal below.

VI. STATEMENT REGARDING ORAL ARGUMENT

On information and belief, oral argument is unavailable on this administrative appeal. However, to the extent the Court would elect to hear same, pursuant to West Virginia Appellate Rule 19(a), this matter is suitable for oral argument in that all parties' assignments of error arise either from EQB's extension and potential disruption of settled law and/or EQB's deviation from settled law beyond the rubrics established by this Court, which would be unsustainable because it obviates an otherwise known right under West Virginia law. For these reasons, AMBIT, by counsel, requests

[68] JA001061.
[69] JA001044-45.

an opportunity to be heard, should oral argument be considered part of this process.

VII. RESPONSE TO PETITIONER'S ARGUMENT

Introduction

AMBIT opposes Murray's continuing efforts to interrupt its operations. Whereas Murray admits that it had no knowledge of AMBIT's permit nor its participation in the UIC program prior to Murray's happening across the renewal on the WVDEP website, now Murray alleges ongoing injury and proceeded against WVDEP relative to AMBIT's third reissuance of its UIC permit. Now Murray seeks a remedy beyond the scope of the administrative appeal – that is, it successfully challenged the renewal process and successfully barred the permit modification granted there. The Board recognized that Murray had proceeded in hopes of vacating the permit, yet the Board declined to exceed the scope of its purview, recognizing that Murray's alleged 'injury' (which AMBIT denies exists) was addressed by the Board's ruling. The Board heard Murray's arguments, found Murray's expert credible --- but, finally, the Board declined to adopt any of the litigants' proposed orders and remedies. The Board wrote its own order, acknowledged the mandates of the system, identified many of the issues popularized by Murray but did not agree with Murray's proposed remedy. Now Murray seeks to accomplish here what it could not accomplish below.

AMBIT seeks a reversal of the Board's Final Order on the basis of Murray's lack of standing or, in the alternative, at a minimum, asks that the Court uphold the Final Order as written and already enforced. Whatever Murray's motivation, the Board recognized it as outside process and declined to legitimize it by exacting the draconian remedy Murray seeks as against a permittee under the guise of administrative review of agency action. AMBIT seeks of this Court the same resolve and restraint here as EQB exhibited below on the penalty issue. After all, AMBIT is only one participant in a large Mine Pool and UIC program. While Murray voluntarily accepted responsibility for the Mine

Pool, AMBIT is an insignificant participant,[70] and no investigation has been done even now to determine whether its waters even leave the Joanna mine void and enter the Mine Pool processes.[71] Whatever Murray truly seeks and why it has selected AMBIT for its attentions, at the end of the day, the legal process must operate within its bounds. Appellant Murray challenged WVDEP's process in reviewing and approving a permit renewal, in particular, in that it sought a modification (cited repeatedly by Murray). If the process was flawed, the remedy would be to address the renewal application and its review/approval by WVDEP, which the Board has done. Whatever else Murray seeks and whatever its agenda, EQB found it unavailable there. AMBIT seeks relief or at least the same restraint here.

A. Standard of Review

Whereas both Petitioner and Respondent rely upon *WVDEP v. Kingwood Coal Co.,* 200 W. Va. 734, 490 S.E. 2d 823 (W.Va. 1997), Petitioner identifies the standard of review as *de novo.* However, it would appear that EQB reviews WVDEP's process *de novo.* Conversely, upon this review, the Supreme Court reviews findings of fact by the EQB under a deferential standard, such that the EQB's findings of fact will not be set aside or vacated unless clearly wrong. While this Court has held that administrative interpretation of the law will be afforded sound consideration, this Court has further held that it will review questions of law arising from an administrative body *de novo. Martin v. Randolph Cty. Bd. of Educ.*, 195 W. Va. 297, 304, 465 S.E.2d 399, 406 (1995). *See also* West Virginia Code Section 29A-5-4. In particular,

> """Upon judicial review of a contested case under the West Virginia Administrative Procedures Act, Chapter 29A, Article 5, Section 4(g), the circuit court may affirm the order or decision of the agency or remand the case for further proceedings. The circuit court shall reverse, vacate or modify the order or decision of the agency if the substantial rights of the petitioner or petitioners have been prejudiced because the administrative findings, inferences, conclusions, decisions

[70] JA000859ff.

[71] Evidentiary Hearing Tr. at 258, 296, 452, 458.

> or order are '(1) In violation of constitutional or statutory provisions; or (2) In excess of the statutory authority or jurisdiction of the agency; or (3) Made upon unlawful procedures; or (4) Affected by other error of law; or (5) Clearly wrong in view of the reliable, probative and substantial evidence on the whole record; or (6) Arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.'" Syl. Pt. 2, *Shepherdstown Volunteer Fire Department v. Human Rights Commission, 172 W.Va. 627, 309 S.E.2d 342 (1983).*' Syllabus Point 1, *St. Mary's Hospital v. State Health Planning and Development Agency, 178 W. Va. 792, 364 S.E.2d 805 (1987).*" Syl. pt. 1, *HCCRA v. Boone Memorial Hospital, 196 W. Va. 326, 472 S.E.2d 411 (1996).*

Syl. pt. 3, *Kingwood Coal Co., supra.* The "reviewing court looks to the [Board's] action to determine whether the record reveals that a substantial and rational basis exists for its decision." *Marsh v. Oregon Natural Resources Council*, 490 U.S. 360, 376-77 (1989). This Court "may reverse the [Board's] decision as clearly wrong or arbitrary or capricious only if the [Board] used a misapplication of the law, entirely failed to consider an important aspect of the problem, offered an explanation that ran counter to the evidence before the [Board], or offered one that is so implausible that it could not be ascribed to a difference in view or the product of [Board] expertise. *See generally Martin v. Randolph County Bd. of Educ.*, 195 W. Va. 297, ___, 465 S.E.2d 399, 406 (1995)." *In re Queen,* 195 W. Va, 442,446, 473 S.E.2d 483, 487 (1998).

> **B. Response to Assignment of Error Number 1:** While American Bituminous Power Partners, LP (AMBIT) disputes that Petitioner herein had standing to proceed below (and without waiving same), the Environmental Quality Board acted within its legitimate powers in reducing the permit values to the 2014 level, in that the Board found that the permitted increase in volumes was arbitrary and capricious. It acted within its legitimate powers in declining to act further.

On June 26, 2020, Murray filed its administrative appeal of WVDEP's approval and issuance of UIC permit 394-01-049, responsibility for which permit currently rests with AMBIT. JA000026. On August 24, 2020, AMBIT filed its motion to intervene, which was granted by EQB order on the same date. JA000389, JA000392. Six days later, on August 31, AMBIT filed its motion to dismiss or for more definite statement, challenging Murray's standing before the EQB

on its administrative appeal. JA000397. As alleged therein, AMBIT noted that "the only standard [Murray raised] is its individual expectations and estimations of how the process could operate more beneficially for Murray itself." JA000398. AMBIT noted (as had Murray itself) that AMBIT was complying with its permit as it was authorized to do:

> Not unlike a citizen who protests a 70 mile an hour speed limit by filing a protest against a compliant driver, Murray seeks to challenge the underground injection control(UIC) permitting process generally and, presumably, the injection practice itself, by challenging a lawful permittee who has applied for and received its third reissuance of an UIC permit.

JA000399. In its administrative challenge to AMBIT's permit reissuance, Murray alleged *inter alia* that the UIC permit allowed AMBIT to inject what Murray considered inappropriate amounts of injectate the Fairmont Mine Pool system. JA000028. However, West Virginia law sets no injection flow limits generally but rather controls levels by *inter alia* setting permitted injection flow limits. By West Virginia law, as a holder of an approved permit, AMBIT is allowed to inject into the designated mine void within pre-approved conditions, and the undisputed evidence at hearing was that the Mine Pool levels had remained unchanged over time, regardless of the volume of AMBIT's permitted injections. Evidentiary Hearing Tr. at 75ff. Murray has failed to identify let alone prove an injury-in-fact, a legally protected interest that was violated, any contract or agreement between the parties, anything that would give it approval rights and reimbursement. AMBIT renews its objection here to this process and Murray's participation, given what AMBIT sees as failure of standing.[72]

Assuming *arguendo* that Murray had standing to proceed below or to appear here, AMBIT opposes Murray's efforts to vacate AMBIT's UIC permit as outside the scope of the administrative appeal of WVDEP's practices relative to a renewal application. Indeed, the Brief itself concedes as

[72] *See* Brief of Petitioner (21-0885, 21-0893).

much, initiating argument by addressing DEP's authority and AMBIT's application.[73] If there were ever any doubt that Murray has an agenda separate and apart from EQB, it bears noting that its Brief demonstrates the same. That is, by example, Murray argues that "'[t]he Board also determined that DEP 'could *not* have properly assessed the impact [of AMBIT's injection operations] on active mine operations, the Fairmont Mine Pool, the waters of the state, etc. DEP' s approval of the application was therefore arbitrary, capricious, and in violation of applicable statutory and legal provisions.'"[74] However, Murray has inserted 'AMBIT's injection operations,' when the subject in the sentence as written is 'DEP's approval of the application,' as follows: "Accordingly, DEP could not have properly assessed the impact on active mine operations, the Fairmont Mine Pool, the waters of the state, etc. DEP' s approval of the application was therefore arbitrary, capricious, and in violation of applicable statutory and legal provisions."[75] Even now, Murray's grasp exceeds what is rightfully at issue. AMBIT's injection operations were never the subject of the EQB process. WVDEP was the respondent, and its review and approval processes were the subject of the EQB process. The Board found that its denial of the modification would likely redress Murray's concerns raised in its appeal.[76] Only Murray sought to take more; only Murray is attempting permit revocation even now, using a challenge to WVDEP's renewal review practices as an improper and insufficient springboard. It is little surprise that the only authority Murray found to support that enterprise is a 2015 district court case that has never been cited outside the Ninth Circuit.[77] That said, even the Ninth Circuit

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[73] Petitioners' Brief at 17.
[74] Petitioners' Brief at 17.
[75] JA001062.
[76] JA001062.
[77] Petitioners' Brief at 19, citing *Klamath-Siskiyou Wildlands Ctr. v. Nat'l Oceanic and Atmospheric Admin Nat'l Marine Fisheries Serv.*, 109 F. Supp. 3d 1238, 1241 (N.D. Ca. 2015). *See* JA001061.

considered exactly the same factors as did the EQB – "the disruptive consequences that would result from vacatur."[78]

Murray argues that the Board failed to consider or reflect several of its arguments and 'evidence' it believes it adduced at evidentiary hearing.[79] In its zeal to take AMBIT's permit (to whatever end has yet to be revealed), Murray turns on the Board just as it did WVDEP when it argues that, just as "DEP did not have the discretion to ignore any of those violations, the Board also had no authority to do so."[80] Undercutting Murray's arguments against the Board, however, West Virginia law does not mandate the scope of EQB's review and decision. West Virginia law provides that after evidentiary hearing and after consideration of all of the testimony, evidence and record in the case, EQB "shall make and enter a written order affirming, modifying or vacating the order, permit or official action of the chief or secretary, or shall make and enter such order as the chief or secretary should have entered, or shall make and enter an order approving or modifying the terms and conditions of any permit issued[.]"[81] As expressly recounted in the Final Order, the Board heard and reviewed the testimony of the six witnesses, considered the submissions by the parties, and then recounted the portions of the record paramount to the Board in reaching its findings.[82] The Board recounts expressly that it reviewed each of the proposed orders,[83] therefore, Murray's as well,[84] yet elected to enter its own order: "After consideration of the proposed findings and conclusions, reply briefs, the evidence of record, expert testimony and arguments of counsel, the Board members who heard this appeal have decided to issue this Final Order granting the Appellants' appeal in part and

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[78] *Klamath,* 109 F. Supp. at 1242. Citing vacatur as rare, the district court engaged in a detailed factual analysis and then vacated only two 'take permits,' endangering coho-salmon and northern spotted owls.
[79] Petitioners' Brief at 18.
[80] Petitioners' Brief at 18.
[81] West Virginia Code Section 22B-1-7(g).
[82] *See* Final Order, generally (JA001044ff).
[83] *Id.*
[84] JA00884.

to modify the AMBIT 2020 UIC Permit."[85] The Board heard and understood the evidence before it, and the Board issued a Final Order that falls within the law and its discretion. The fact that Murray wants more, would take more, is of no moment, absent abuse of discretion by the Board – which is not apparent or reflected here.

Repeatedly in its Brief, Murray cites to current maximum rates of injection,[86] up-dip/downdip evidence,[87] flowpath,[88] adequacy of alternative plan,[89] legal right to inject,[90] compliance issues,[91] hydrologic balance,[92] stormwater provisions,[93] legal advertisement[94] and MSHA approval.[95] However, several of these were referenced in the Final Order, and all of them were subject to conflicting testimony at Evidentiary Hearing. The Board expressly states that it considered the evidence of record and that it reviewed Murray's proposed Final Order, which recounted all of these issues in detail.[96] Despite Petitioners' Brief's referencing DEP's actions upon application review and reissuance, Murray continues its efforts here to attack and undermine AMBIT's operations generally. The EQB process as initiated by Murray does not extend to that challenge nor was evidence of AMBIT's operations generally before the Board. Given the scope of the Fairmont Mine Pool and the treatment plants that Murray operates for that system (not for AMBIT), it is unclear how vacating AMBIT's permit changes Murray's burden. After all, that issue was never before the Board. As AMBIT stated in its proposed order,

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[85] JA001046.
[86] Final Order at 18.
[87] Final Order at 12; Tr. at 632-33.
[88] Final Order at 18.
[89] Final Order at 18.
[90] Tr. at 251 (finding the term outside the UIC process).
[91] Final Order at 11-12.
[92] Final Order at 11-12.
[93] Tr. at 331, 667 (addressing this as enforcement issue).
[94] Tr. at 403-04.
[95] Tr. at 585. *See generally* Petitioner's Brief at 9-11.
[96] JA00896ff.

> [t]he Board understands and acknowledges the complexities of the water systems in place and the potential disputes between these two sophisticated commercial entities and involving the many other individuals and entities involved in and/or affected by this process and not participatory nor represented here.
>
> The Board understands and acknowledges the relative financial and other responsibilities undertaken voluntarily by each of the participants here, and potentially, the individuals and entities affected/involved, who are not included in this process before the Board.
>
> As a matter of law and fact, the Board finds that no existing law provides monetary damages or relief, nor has Appellant American Consolidated Natural Resources or ACNR (cited collectively for Murray American Energy, Inc. Marion County Coal Resources, Inc., and West Virginia Land Resources, Inc.) provided evidence of any such law nor any such agreement to be bound by Intervenor or other mine pool participants.
>
> As a matter of law and fact, the Board finds that no existing law or regulation limits the amount of Injectate Intervenor American Bituminous Power Partners, LP (AMBIT) or any other permit holder may inject, nor has Appellant provided evidence of any law or agreement so providing.
>
> The Board also finds that no remedy is available here because the evidence on the direction of flow and the final destination of injectate in the mine pool system generally is equivocal, with all parties introducing compelling but disputed evidence that evades final conclusion without additional technical review and study unavailable here or through this process.
>
> Further, the Board understands and acknowledges that the mine pool system and the monitoring and control of the mine pool system was initiated by federal and state government mandates that predate these parties, permits and appeal, and that the program itself does not provide rights or remedies between these participants.[97]

While the Board elected to prepare its own order, all of the above information remains true – or at least unproven to be false. Murray argues that "[t]he Final Order contains no discussion of the Board's rationale of how effectively affirming the reissuance of UIC Permit without the requested increased injection volumes was an appropriate remedy for the multiple deficiencies identified by the Board."[98] Yet the Board clearly identifies the scope of its review, its reasoning in so holding,

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[97] JA000930ff. Formatting changed for presentation here.

[98] Petitioners' Brief at 19.

and its reason for not vacating the permit. As set forth repeatedly here, the Board found not only what was proven but also what was not. At the end of the day, Murray failed to prove flowpath, which finally is outcome determinative for it. As demonstrated here, each of the alleged deficiencies was the subject of conflicting evidence. However, what the Board heard what is reflected in the Final Order -- that Murray voluntarily accepted responsibility for the management of the Mine Pool and its AMD plants.[99] As a result, Murray incurs costs[100] for treating and pumping.[101] And that the Board's Final Order addresses that issue without crippling AMBIT's operations unnecessarily, given that AMBIT has been operating as permitted within the UIC program.[102] That is not to say that the Final Order is not without flaw,[103] but it is within West Virginia law and the Board's discretion in terms of outcome. AMBIT renews its objections to the process on the basis of standing and to the Final Order (which reflects Murray's case but not AMBIT's defense). All of that said, Murray has received the process it sought and deserved, such that its appeal here must fail as a matter of law and fact.

> **Response to Assignment of Error Number 2:** While AMBIT disputes that Petitioner herein had standing to proceed below, the Environmental Quality Board assembled a full factual record before determining how best to proceed.

As AMBIT has asserted in its appeal pending before this Court, Murray has yet identified any basis for standing, that is, any legally protected interest, let alone a legally protected interest that is concrete, particularized, actual or imminent and not conjectural or hypothetical. Syl. pt. 5, *Findley v. State Farm Mut. Auto. Ins. Co.*, 213 W. Va. 80, 576 S.E.2d 807 (2002). EQB found that the flowpath has yet to be identified with any particularity, and, indeed, Murray has not and cannot

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[99] JA001049.
[100] JA111050.
[101] JA001052.
[102] JA001061.
[103] *See, e.g.*, water would need to flow uphill, but see JA000705 (Murray's CHIA, showing that, post operations, its water/AMD will flow east – and allegedly uphill).

prove that AMBIT's injectate travels anywhere outside its void. Additionally, Murray has alleged "impact . . on operations and associated costs" without authorization or approval[104] but has yet to identify any statute, regulation, contract or other to support its position that, by complying with the regulatory rubric, AMBIT somehow had a duty to Murray to seek approval or authorization or to interact otherwise. In light of that failure and as the appeal process progresses, it becomes more imperative to ask the source of Murray's animus toward AMBIT, where the administrative appeal process that was supposed to be about WVDEP became all about AMBIT's UIC permit. It is a question worthy of consideration but one that has evaded response to date.

Once again, without conceding standing, AMBIT addresses Murray's arguments to what it perceives as the Board's arbitrary failures to address important grounds for reversing DEP.[105] Perhaps most notably, Murray states that it was "entitled to have *some* description of how the Board 'considered' every appeal ground raised, because otherwise it is impossible to determine whether the Board actually addressed them." Petitioners' Brief at 24. However, West Virginia law focuses on whether the Board misapplied the law, failed to consider an important aspect of the problem, offered an explanation that ran counter to the evidence before the Board or offered an explanation that is so implausible that it could not be ascribed to a difference in view or the product of EQB's expertise.[106] Here, Murray alleges that EQB failed to focus on important aspects of the problem, including, pointedly, the material to be injected, the alternative treatment plan, the down-dip and up-dip issues, the hydrologic balance, the regulatory history of the permit, the issues related to the legal advertisement, notice to MSHA – which Murray amazingly identifies as "essentially

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[104] JA000028.
[105] Petitioners' Brief at 20.
[106] *Martin v. Randolph County Bd. of Educ.*, 195 W. Va. 297, ___, 465 S.E.2d 399, 406 (1995); *In re Queen,* 195 W. Va, 442,446, 473 S.E.2d 483, 487 (1998).

undisputed."[107] However, the record below provides clear evidence to the contrary, as reflected largely by AMBIT's proposed findings of fact, conclusions of law, in particular by example as follows (JA000928ff):

> 52. No statutory nor regulatory authority exists under West Virginia law to require or allow WVDEP to inquire into legal right to inject. Tr. at 250-51. Often applicants produce documentation in response to the 'legal right to inject' inquiry, including leases (as here), but WVDEP does not investigate this issue nor require documentation. Tr. at 251. AMBIT only needed to demonstrate legal right to inject into the Joanna Mine void, and it provided that documentation. Tr, at 366-67.
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> 53. Here, proper notice was issued, but no comments were received. Tr. at 255. WVDEP provides for public notice and comment so that "[i]f the public have any issues or concerns about the activity, about any health or environmental concerns, they can submit comments and request a hearing, if necessary, and we will -- we would address their comments." Tr. at 254. MSHA is provided a copy of the application so that its representatives can comment or identify complications. Tr. at 256-57. 55.
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> 66. While the application contains language regarding a "legal right to inject" into the receiving mine void by the applicant, the governing regulations, 47 CSR § 13-1 et seq., do not contain any legal requirement or authority for DEP to review on this subject. Hudnall testified that the language in the application is just "additional information" that the DEP collects for clarification and to protect the DEP. Tr. at 251.
>
> 67. In this case AMBIT's application stated that it had the legal right to inject and provided the DEP with lease documents for its leasehold on the Joanne mine facility. Tr. at 251-52.
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> 68. [WVDEP witness] Hudnall testified that a UIC applicant must publicly advertise a draft of the proposed permit when DEP determines that the draft meets legal requirements. The purpose is to provide the public, including any mineral owner, with the draft permit so that the public may submit comments or request a public hearing before final issuance of the permit. Tr. at 253-55.
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> 69. DEP prepares the advertisement that the applicant must advertise in the paper with the highest reader rate in the county where the activity is located. Tr. at 253-54.
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> 70. Here, AMBIT advertised the draft Permit in the Fairmont *Times West Virginia*. CR at 48. The advertisement advertises a 30-day comment period for the draft permit. Tr. at 254. No comments were received. Tr. at 254-55, 257.
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> 71. Hudnall testified that the advertisement met all legal requirements found in 47 CSR § 13-1 et seq. Tr. at 255.
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> 72. Once again, Hudnall testified that he communicated with Justin Smith and Jon Nagel of ACNR in February 2020 while the application was still being reviewed and accomplishing notice in fact. *See* Appellee Exhibits #3 and

[107] Petitioners' Brief at 22.

11; Tr. at 259ff. Further, Hudnall testified that Jon Nagel telephoned him specifically regarding the proposed injection by AMBIT into the Joanne mine void. Tr. at 261.

73. Hudnall confirmed, however, that actual notice was achieved through Messrs. Smith and Nagel. Tr. at 259.

74. The applicant is also required to notify MSHA of its application. Tr. at 256-57. Hudnall testified that AMBIT's application provided that MSHA had been notified. *See* Appellant's Exhibit #8.

75. While MSHA does not "approve" the application, Hudnall testified that he spoke with Jim Toothman of MSHA who relayed that MSHA did not believe that the issuance of the permit would not have any health and safety impact on ACNR's mines. Tr. at 255.

* * *

87. During cross-examination, Hudnall agreed that surface runoff generally cannot be a part of injectate unless it receives treatment. Hudnall clarified that the DEP allows the practice where it is impractical for the surface runoff to be separated. Tr. at 327.

88. Here, DEP was satisfied that separation was impractical. As noted above, the application states that as much as 20% of the total injectate may be surface runoff, but DEP did not place a limit on surface runoff in the Permit. Hudnall acknowledged that the addition of surface runoff was a modification to the Permit. The runoff comes from the slope above the seep collection area. Tr. at 327-31.

* * *

166. [AMBIT's witness] Thompson explained legal right to inject through the lease with Horizon which requires AMBIT to' perform all actions incidental to the reclamation of the Joanne parcel.' Tr. at 675, citing section 3 of the lease. Thompson also pointed to section 9 of the lease, which requires landlord to deliver the site in full compliance with law and requires AMBIT to maintain the permits. Tr. at 676.

The application itself addresses the materials injected and identifies seventeen (17) different components that are monitored over time.[108] Just as Murray cites and relies upon its proposed final order (Petitioners' Brief at 20-22), so too AMBIT submitted a proposed order that presented its estimation of the evidence presented at Evidentiary Hearing.[109] The Board's Final Order provides expressly that it considered the submitted findings and conclusions, and determined it would prepare its own Final Order,[110] which is well within its discretion to do. As noted by Murray, EQB provided

[108] JA000049-50.
[109] JA000928ff.
[110] JA001046.

"an 'explicit statement of the underlying facts' that support its rulings." Petitioners' Brief at 22, citing W. Va. Code § 29A-5-3. The fact that, apparently, Murray found other facts and arguments that support its desired outcome is of no moment. Six witnesses, three days of hearing, arguments from six attorneys and three proposed orders – all of that was admittedly before the Board.

Where Murray tries to turn evidence into argument, that is its province – not that of the Board. Where Murray argues that AMBIT was "*injecting*" surface runoff from the site into the Joanne Mine (Petitioners' Brief at 22, emphasis in the original), the actual evidence was that, under the prior permit, DEP was satisfied that separation of surface water was impractical. Evidentiary Hearing Tr. at 327-31. Thereafter, AMBIT installed a French drain system onto the Joanna Parcel that reduced almost completely the incursion of surface waters into the mine void, all of which Murray fails to concede. Evidentiary Hearing Tr. at 667-68.

Whereas Murray argues up-dip and down-dip as if they were established facts, the evidence at hearing was that a huge solid coal barrier separates the Joanna Mine Void from Murray's active mineworks. Specifically, by example, WVDEP's Robert Hudnall testified that AMBIT's permit application correctly stated that it was not "updip" of other adjacent mine workings since a large coal barrier separates the Joanne mine void from other "adjacent" mine workings. Evidentiary Hearing Tr. at 384. Mr. Hudnall testified that this was the way DEP reviewers interpreted the question and that his understanding of 'adjacent' is directly next to, 'right beside it.' Evidentiary Hearing Tr. at 384, 410.

In a nutshell, what Murray characterizes as an undisputed, open-and-shut case was conversely three long days of testimony, numerous exhibits, voluminous submissions – all of which was acknowledged by the Board in preparing and entering its own Final Order. *See* JA001046. The Board is not required to reflect all facts of importance to Murray, but rather to reflect the facts and

conclusions that support its rulings. The Board is not required to grant the relief that Murray seeks – indeed, the Board may have wondered at Murray's motives as well. Nonetheless, once Murray was before the Board (as contested on the basis of standing), the process operated as intended, regardless of Murray's acquiescence therewith.

Both Murray and AMBIT criticize the Board's footnote 3.[111] However, where Murray questions whether a more onerous penalty could have or should have been extracted as against AMBIT, AMBIT's motions practice went without rulings, without orders, and even without mention. To the extent that Murray prevailed below and is dissatisfied because no revocation occurred, the Board's Final Order provides support for the Board's actions in proceeding against WVDEP. AMBIT asserts that its defenses appear nowhere in the Final Order – but that is an issue for the companion appeal, referenced and preserved in passing here.

Finally, the Board did criticize WVDEP's process and did exact punishment on both WVDEP and, by and through WVDEP, AMBIT. In its Brief, Murray has recounted voluminous segments of its proposed final order,[112] which EQB expressly stated it reviewed and rejected (along with the other parties' proposed orders, including AMBIT's).[113] Unfortunately for Murray in prevailing, it can 'win' its administrative appeal, but it cannot select the penalty nor the grounds. While it bears asking what Murray's motive is in pursuing AMBIT to all ends, nonetheless, Murray received the process it requested and more than it deserved, given its lack of standing.

EQB complied with its legal mandates and discretionary latitude in reviewing the evidence and the proposed orders, and selecting its own outcome, its own rationales and its own penalties, all as set out in the Final Order entered herein. Therefore, regardless of whether Murray is satisfied,

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[111] Petitioners' Brief at 24; Brief of Petitioner at 25.
[112] Petitioners' Brief at 24
[113] JA001046.

the instant appeal must fail as a matter of law.

> **Response to Assignment of Error Number 3:** While AMBIT disputes that Petitioner herein had standing to proceed below, Petitioner impermissibly and without basis estimates the Board's reasoning and finds it lacking. Conversely, the Board acted within its legitimate powers and, if Murray had standing to proceed, the Final Order must stand.

As an initial matter, AMBIT renews its position that Murray had no standing below to bring the initial administrative appeal and no standing to bring the instant appeal, given that it has demonstrated no injury whatsoever but rather a generalized annoyance or discontent with the UIC process. Murray has identified not one particularized fact that could be found to constitute an injury-in-fact, which pursuant to West Virginia law is the necessary predicate to its action here. Syl. pt. 2, *SER Healthport Techs.,* 239 W. Va. 239, 800 S.E.2d 506)2017). Where Murray below alleged "impact . . on operations and associated costs," it bears noting once again no statute, regulation, contract or other exists or has been cited by Murray to support its position that, by complying with the regulatory rubric, AMBIT somehow had a duty to Murray and that the unknown, so-far baseless duty is enforceable before the EQB. Murray still has not identified a basis for any legally protected interest, let alone a legally protected interest that is concrete, particularized, actual or imminent and not conjectural or hypothetical. Syl. pt. 5, *Findley v. State Farm Mut. Auto. Ins. Co.,* 213 W. Va. 80, 576 S.E.2d 807 (2002). Even assuming that Murray incurs costs from treating AMBIT's Injectate (which has never been proven), nonetheless, the duty to operate the AMD plants and the management of the Mine Pool was undertaken voluntarily by Murray without a contract or agreement in place that would ensure reimbursement or contribution from AMBIT nor from, apparently, any other entity.[114]

[114] Evidentiary Hearing Tr. at 59, 698, 86, 115, 127.

Without waiving that objection and while asserting that Murray has no standing to proceed, AMBIT asserts that the record is clear that the Board and WVDEP recognized this as a renewal. JA001046. The application itself stated 'reissuance' (JA000034), and, regardless, as Murray requests now, the underlying review provided by WVDEP focused on each aspect of the application and permit. JA000680, JA000689. The fact that the Board's finding may have been more limited than Murray had hoped, focusing on only "[t]he reissuance of the AMBIT 2020 UIC Permit as it applies to increasing the injection volumes of untreated AMD [which EQB found] was arbitrary and capricious[,]" that is nonetheless within the Board's authority and discretion. Whether the Board found the other alleged flaws and imprecisions to be contested, equivocal given the evidence on both sides or otherwise beyond comment and revision, will remain unknown to the parties and this Court. However, it is indisputable that the Board's focus on the increased volumes alone is within its authority and discretion, is within the evidence presented,[115] and therefore is beyond this Court's purview. That is, Murray has not demonstrated that the Board's focus on the increase in permitted limits alone violates constitutional or statutory provisions; exceeds the Board's statutory authority or jurisdiction; was reached upon unlawful procedures; arose from other error of law; is clearly wrong in view of the reliable, probative and substantial evidence on the whole record; or was arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion. Murray disagrees, pushes for more remedy, more process, even as Murray cites to its voluminous proposed final order that address all of its issues and evidence[116] (which the Board likewise referenced and reviewed in its Final Order[117]). However, the Board's actions and Final Order (assuming Murray had standing to proceed, which AMBIT does not concede) are lawful,

[115] AMBIT disputes that evidence and the related finding, given the prior permitted value of 'report-only.'
[116] *See, e.g.,* Petitioner's Brief at 20-25.
[117] JA001046.

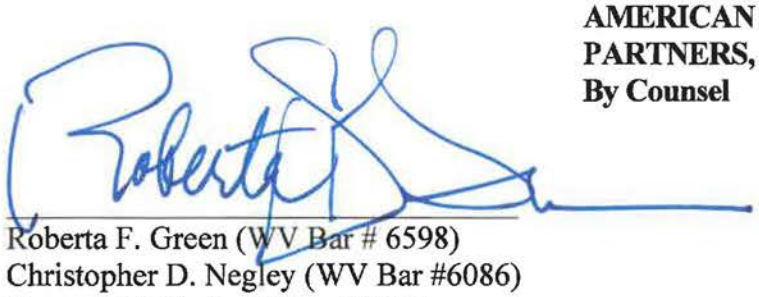
within the Board's enabling statute and the Administrative Procedures Act generally. *WVDEP v. Kingwood Coal Co.*, 200 W. Va. 734, 490 S.E. 2d 823 (W.Va. 1997); W. Va. Code § 29A-5-3, -4. For these reasons (assuming *arguendo* that this Court finds standing), the Final Order is appropriate, within the Board's authority and discretion, and is fairly tailored to accomplished the ends the Board deemed just. West Virginia law would support that process, and this Court should uphold it as same.

Conclusion

Under West Virginia law, it is incumbent on plaintiffs to establish standing, that is, to demonstrate an injury-in-fact, invasion of a concrete, particularized, actual legally protected interest that is causally connected to the conduct forming the basis of the lawsuit. Plaintiffs must prove that it is likely that the injury will be redressed through a favorable decision of the tribunal. The Environmental Quality Board erred in allowing Murray American Energy, Inc. (MAEI), American Consolidated National Resources (ACNR), West Virginia Land Resources, Inc. (WVLRI), and Marion County Coal Resources, Inc. (referenced here as Murray) to proceed without a finding of standing to proceed. The Board did not err in focusing on all of the witnesses, all of the testimony, all of the parties' submissions, and electing to proceed on what, in its authority and discretion, the Board found to be the result of WVDEP's regulatory failures. AMBIT was not the respondent below, such that its operations and its permit were not directly before the Board or this Court. In focusing on the modification and its impact on Murray, the Mine Pool and this State, the Board comported with its authority and discretion. It is of no moment whether Murray would proceed further or expect more. For these reasons and those set out further above, Petitioners' Brief fails to present errors or omissions allowing or mandating revision by this Honorable Court. Therefore, Murray's appeal must fail as a matter of law.

American Bituminous Power Partners, LP (AMBIT) seeks the relief this Court deems just.

AMERICAN BITUMINOUS POWER PARTNERS, LP
By Counsel



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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA
NOS. 21-0845, 21-0893, 21-0885

WEST VIRGINIA LAND RESOURCES, INC.,
MARION COUNTY COAL RESOURCES, INC.,

Petitioners,

vs. **No. 21-0845**

AMERICAN BITUMINOUS POWER PARTNERS, L.P.,
a Delaware limited partnership, and
WEST VIRGINIA ENVIRONMENTAL QUALITY BOARD,

Respondents.

CERTIFICATE OF SERVICE

I hereby certify that I, Roberta F. Green/Christopher D. Negley, have this day, the 28th day of December, 2021, served a true copy of the foregoing **Brief of Respondent** via U.S. first class mail (courtesy copy via email) to the following:

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